states that any beneficiary named shall be deprived of all benefits if he contests the provisions of the instrument.[24]

This latter distinction has been severely criticized[25] and cited as authority for the proposition that the doctrine is to some extent based upon the intention of the testator.[26] The courts are apparently confusing an election based upon compensation with an absolute forfeiture. The testator's intention as expressed is not that he intends a beneficiary to be put to his election, but that every benefit conferred by the will shall be forfeited if the instrument is contested. Compensation alone would not satisfy the terms of the will. The criticism thus seems far afield as no true case of election exists as to any portion of a will which is invalid due to improper execution or due to the operation of law. The better view is that the intention of the testator, so far as the election itself is concerned, is not the basis of the doctrine;[27] but this intention is not to be confused with that of the testator expressed in the will to dispose of the property mentioned.

The rules laid down in the conflicts cases are similar. To quote Younger, J.: "If by the law of the domicil the gift . . . be, irrespective of its locality, to any extent invalid, there is no case of election;" at the domicil, unless the testator forbids the contesting of the will; "if it is only by the law of the *lex rei sitae* that the gift is inoperative, then the foreign heirs are put to their election."[28]

Here again, where the will is invalid by the rule of the domicil, and the testator has expressedly provided for a forfeiture of the gifts of those who contest the will, the question becomes one of forfeiture and not one of election. The writer has not discovered any case where the word "election" has been used of a will under such circumstances.

Though the foregoing test may be satisfied at least one additional element is necessary to invoke an election. If the devisee or the legatee desires to claim under the will, he will not be put to his election where he takes by operation of law that which he takes under the will,[29] or where the law has imposed upon him an inability to perform the terms of the will.[30] No case has been found which compelled the beneficiary to make compensation to disappointed parties under such circumstances. It is difficult to discover anything unconscionable in the conduct of one who requests the court to retain that which has passed to him under a will and that of which the law forbids him to dispose in the manner directed by the will.

SUBSTANTIAL PERFORMANCE OF AN EXPRESS CONDITION PRECEDENT.—It may truthfully be said that insistence upon literal compliance with express conditions precedent often works great hardship.[1] And so courts which insist upon strict performance of such conditions are ingenious, whenever this rule would be harsh,

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[24] *Boughton* v. *Boughton* (1750) 2 Ves. 12; see *Ogilvie* v. *Ogilvie* [1918] 1 Ch. 492; *Washburn* v. *Van Steenwyk, supra,* footnote 2; but see *Lefevre* v. *Lefevre* (1875) 59 N. Y. 434.

[25] See *Brodie* v. *Barry* (1813) 2 V. & B. 127, 129, 130; *Van Dyke's Appeal* (1869) 60 Pa. St. 481.

[26] See *Ogilvie* v. *Ogilvie, supra,* footnote 24.

[27] See (1911) 11 COLUMBIA LAW REV. 588; 1 Jarman, *op. cit.* 534. In many jurisdictions a clause forbidding the contest of the validity of a will is repugnant to public policy. See (1912) 12 COLUMBIA LAW REV. 754. But it is believed the above proposition is correct in these jurisdictions.

[28] See *Ogilvie* v. *Ogilvie, supra,* footnote 24, at p. 501; *cf. Van Dyke's Appeal, supra,* footnote 25.

[29] *Ward* v. *Ward* (1890) 134 Ill. 417, 25 N. E. 1012.

[30] *In re Lord Chesham; Cavendish* v. *Dacre* (1886) L. R. 31 Ch. 466.

[1] "That justice requires relief against the condition [precedent] where a forfeiture will be caused, without fault on the part of the builder, may be admitted . . . ." 2 Williston, *Contracts* (1920) 1527.

in construing the contract as consisting of independent promises,[2] or in construing the conditions so that the attempted performance of the plaintiff is a compliance therewith.[3] And in order still further to mitigate the harshness of their doctrine, they allow recovery in quasi-contract where the plaintiff has benefited the defendant and where he has in good faith endeavored to perform the contract.[4] Some courts go even further and allow recovery although the plaintiff has wilfully abandoned the contract.[5]

Furthermore, the courts do not apply the stringent rule of strict performance to conditions implied in law.[6] Since they themselves have imposed these conditions, they feel at liberty to attach thereto those legal consequences which will best serve the interests of justice. Thus, under proper circumstances, the plaintiff may recover upon proving substantial performance.[7] But there seems to be no justifiable basis for this distinction.[8] An implied condition is imposed by the court where the parties themselves would most probably have imposed an express condition had they fully comprehended the scope of the contract. So where there is a condition, whether it be express or implied, the legal consequences thereof should be the same. Thus if the courts deem it unjust to require literal performance of an impliedly conditional promise because the parties did not contemplate the particular harsh result which would otherwise follow, no more should the courts, under similar circumstances, require literal performance of an expressly conditional promise.

This insistence upon strict performance of the promise stipulated by the parties to be an express condition precedent is based upon the doctrine that a

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"While the New York building contract cases seem to violate the express contract of the parties [by not requiring a literal compliance with the condition precedent] they do seem to apply the fairest rule of damages . . ." "Theoretically the New York rule is unsound, but as a practical matter it seems to secure a just result." Costigan, *Performance of Contracts* (1911) 42, 43.

[2] The plaintiff conveyed to the defendant the equity of redemption of a plantation together with the stock of negroes upon it. The defendant covenanted "that the plaintiff well and truly performing all and everything" on his part would pay £500 and an annuity of £160. The plaintiff did not have title to the negroes, and so could not convey them. Lord Mansfield held that the defendant "shall not plead it as a condition precedent," but should recoup by damages. *Boone* v. *Eyre* (1777) 1 H. Bl. 273 n; *Newson* v. *Smythies* (1858) 3 H. & N. *840.

[3] *Liverpool etc. Ins. Co.* v. *Kearney* (1901) 180 U. S. 132, 21 Sup. Ct. 326. A warranty by the plaintiff that all the answers were "true" was held to mean that the answers were "not fraudulent" where the plaintiff had said that no brother had died when in fact, unknown to him, one had, and the insurance company had contested payment because of that variance. *Globe Life Ins. Assn.* v. *Wagner* (1900) 188 Ill. 133, 58 N. E. 970.

[4] *Lakeman* v. *Pollard* (1857) 43 Me. 463; see *Viles* v. *Kennebec Lumber Co.* Me. (1919) 106 Atl. 431, 433; *Handy* v. *Bliss* (1910) 204 Mass. 513, 518, 90 N. E. 864; (1907) 7 COLUMBIA LAW REV. 418; *cf.* Uniform Sales Act § 44.

[5] *Williams* v. *Crane* (1908) 153 Mich. 89, 116 N. W. 554; see *Eckes* v. *Luce* (Okla. 1918) 173 Pac. 219, 220.

[6] A condition implied in fact is analogous to and treated like an express condition. Costigan, *op. cit.* 45.

[7] In contradistinction to express conditions, a condition implied by law is always subject to the doctrine that where a defendant has "received a substantial proportion of the consideration, it is no longer competent to rely upon nonperformance of that which might originally have been a condition precedent." Costigan, *op. cit.* 37. But in the case of *Carter* v. *Scargill, infra,* footnote 23, chiefly relied upon by the learned author, the conditions were express.

See 2 Williston, *op. cit.* 1614.

Smith v. *Cunningham Piano Co.* (1913) 239 Pa. St. 496, 86 Atl. 1067; *Henry* v. *Jones* (1914) 164 Iowa 364, 145 N. W. 909; see *Easten Forge Co. of Mass.* v. *Corbin* (1903) 182 Mass. 590, 592, 66 N. E. 419.

[8] The distinction between express and implied conditions "seems to be of no practical importance at the present day." Harriman, *Contracts* (2nd ed. 1901) § 315.

promise must always be performed precisely as made[9]—that the legal consequences attaching to a promise are coextensive with the factual undertaking. But in fact the law knows no such doctrine, and the obligations arising from a promise are not necessarily coextensive with the promise.[10] The imposition of an implied condition adds a term to the contract as expressed.[11] A carrier may be liable on the contract of carriage for a loss due to negligence though the parties agreed that carrier should not be so liable.[12] A vendor of land who contracts to sell the fee, but who has only a lesser estate, may be compelled to convey that lesser estate.[13] Though the parties to an insurance policy may have expressly stipulated that a certain statement shall be a warranty, by statute in some states the courts treat it as a representation and then enforce the contract of insurance as altered.[14] Though the plaintiff agreed to do work to the satisfaction of the defendant, in many jurisdictions the plaintiff may recover if in reason the defendant should have been satisfied.[15] And where the obtaining of an architect's certificate is made a condition precedent to recovery by a contractor, many jurisdictions hold that if the architect unreasonably withholds the certificate, the contractor may recover without it.[16] The drawer of a note payable at a particular place is in default though the presentment was made at a different place.[17] And the performnce of an "independent promise" may be excused because of an essential breach of another "independent promise,"[18] or, under proper circumstances, by impossibility of performance.[19] Thus the courts, in order to effectuate what the parties would probably have desired if they had contemplated the exact contingency which arose, often impose legal consequences not coextensive with the factual promise. So in the recent New York case of *Jacob & Youngs* v. *Kent,* the court merely followed this just doctrine[20] when it allowed the plaintiff to recover in special assumpsit upon proof of substantial performance of a building contract, though the plaintiff

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[9] *Cf. Banco De Sonora* v. *Bankers Mutual Casualty Co.* (1904) 124 Iowa 576, 100 N. W. 532.

[10] Mr. Justice Holmes suggests that one "commits a contract." Holmes, *Collected Legal Papers* (1920) 175.

[11] Where the plaintiff agreed to guarantee payment by a third party should the defendant extend credit to said party, the plaintiff was not liable immediately upon the extension of credit, for, as the court said in *Bishop* v. *Eaton* (1894) 161 Mass. 496, 500, 37 N. E. 665, "if the act [of acceptance of the guaranty] is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time . . ." *Cf. Skillman Hardware Co.* v. *Davis* (1890) 53 N. J. L. 144, 20 Atl. 1080.

[12] *South etc. Ry.* v. *Henlein* (1875) 52 Ala. 606.

[13] *Barnes* v. *Wood* (1869) L. R. 8 Eq. 424. See cases cited in 1 Ames, *Equity Cases* (1904) 251.

[14] See *Penn etc. Co.* v. *Mechanics' etc. Trust Co.* (C. C. A. 1896) 72 Fed. 413, 418, 419; *Archer* v. *Equitable etc. Society* (1916) 218 N. Y. 18, 24, 25, 112 N. E. 433.

[15] *Doll* v. *Noble* (1889) 116 N. Y. 230, 22 N. E. 406; *Jansen* v. *Muller* (1917) 38 S. Dak. 311, 162 N. W. 393, (*semble*).

[16] *Taft* v. *Whitney Co.* (1915) 85 Wash. 389, 148 Pac. 43; *MacKnight etc. Co.* v. *The Mayor* (1899) 160 N. Y. 72, 54 N. E. 661.

[17] *Farmers' Nat. Bank* v. *Venner* (1906) 192 Mass. 531, 78 N .E. 540; *cf. Holstead* v. *Skelton* (1843) 5 Q. B. 86.

[18] *University Club of Chicago* v. *Deakin* (1914) 265 Ill. 257, 106 N. E. 790. In reality the court holds the breach a violation of the implied condition to perform.

[19] *Horlock* v. *Beal* [1916] A. C. 486; *Mahaska etc. Bank* v. *Brown* (1913) 159 Iowa 577, 141 N. W. 459.

[20] (1921) 230 N. Y. 239, 129 N. E. 89. Judge Cardozo, speaking for the majority of the court, says on page 891, "from the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable . . . There will be no assumption of a purpose to visit venial faults with oppressive retribution."

had innocently failed fully to perform that which the parties had stipulated as an express condition precedent. Where the plaintiff has acted in good faith,[21] where the purpose of the contract is not frustrated by the variance,[22] where a forfeiture not within the evident contemplation of the parties would result under a different construction,[23] the courts should, in order to do equity, allow recovery on the contract despite an immaterial breach of an expressly or impliedly conditional promise.[24]

USURY AND THE CONFLICT OF LAWS.—When a bond or note or other interest-bearing contract made in one jurisdiction and to be performed in another is usurious in one and valid in the other, have we any general rules by which to determine the law which should be applied? This question was raised squarely in the recent case of *Bowman* v. *Price* (Tenn. 1920) 226 S.W. 210 and was, it would seem, properly disposed of by the court. The plaintiff sued on four notes calling for 8% interest, executed and delivered in Alabama where such rate was legal. The payee was a West Virginian and the maker a resident of Tennessee where, for the maker's convenience, the notes were payable. In both West Virginia and Tennessee 8% was usurious. No evidence of bad faith appearing, the court applied Alabama *law* and found for the plaintiff.[1] The court properly stated that the fundamental principle in these cases is that effect must be given to the presumed intention of the parties.[2] Of course, the court realized that in most of these cases

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[21] See *Easthampton etc. Co.* v. *Worthington* (1906) 186 N. Y. 407, 412, 79 N. E. 323.

[22] See *Hoglund* v. *Sortedahl* (1907) 101 Minn. 359, 361, 112 N. W. 408.

[23] Where the language of the contract indicates that the parties did contemplate the contingency, the plaintiff might with more justice be held to a strict performance. But where, as in the instant case, the contingency seems clearly without the contemplation of the parties, a substantial performance should be a sufficient basis for recovery in contract.

[24] *Foeller* v. *Heintz* (1908) 137 Wis. 169, 118 N. W. 543; *cf. Wiley* v. *Inhabitants of Athol* (1890) 150 Mass. 426, 23 N. E. 311; *Bowen* v. *Kimball* (1909) 203 Mass. 364, 89 N. E. 542. The application of this doctrine is not limited to building contracts. *Carter* v. *Scargill* (1875) L. R. 10 Q. B. 564 (sale of business); see *City of LaFollette* v. *LaFollette etc. Co.* (C .C. A. 1918) 252 Fed. 762, 768 (contract to supply water); *Sult* v. *Warren School Township* (1894) 8 Ind. App. 655, 659, 36 N. E. 291 (subscription contract); *M'Auley* v. *Billenger* (N. Y. 1822) 20 Johns. *89, *90 (subscription contract). In *Carter* v. *Scargill, supra,* the court said, "The defendant having received a substantial proportion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent . . ."

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[1] The writer has seen fit to italicize the word "law," because of the customary looseness with which that term is applied in these cases. Most usury statutes do not expressly profess to deal with contracts not entirely consummated within the borders of the state. Only by judicial interpretation is it possible to extend these statutes to cases involving extra-territorial elements. When a New York court, for instance, professes to apply Alabama "law," what it is really doing is to adopt the Alabama statute as New York law. This can best be illustrated by the fact that it is a not uncommon phenomenon of conflict of laws, that the Alabama court in the exact case before the New York court would have decided otherwise than the New York court. How fatuous then, for the New York court to declare that it is applying Alabama "law."

[2] This rule of presumed or nominal intention, though much favored by English courts in all cases of contract, has been applied in America to but few groups of cases. Such a rule is chaotic from the lawyer's viewpoint. Prediction of judicial decision becomes almost an impossibility when presumed intentions govern. The court has a wide opportunity to decide *a priori* whether it wishes to uphold or invalidate a transaction; if the former, it may easily declare that the parties presumably intended that law to govern which validates the agreement. If the latter, a contrary intention may be presumed.